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*Committee on Employment and Social Affairs*

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**2011/0438(COD)**

7.5.2012

## **DRAFT OPINION**

of the Committee on Employment and Social Affairs

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council  
on Public procurement  
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Birgit Sippel

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## SHORT JUSTIFICATION

The Commission proposal for a directive on public procurement plays a key role in the ‘Europe 2020’ strategy for smart, sustainable, and inclusive growth (COM(2010)2020). Public procurement is to be used increasingly to promote a high employment level as well as helping to achieve other goals, especially in the environment and social policy sphere.

By means of the proposal the Commission is seeking on the one hand to ‘Increase the efficiency of public spending to ensure the best possible ... outcomes in terms of value for money’ and, secondly, to enable public procurement to be put to ‘better use ... in support of common societal goals such as protection of the environment, employment and social inclusion and ensuring the best possible conditions for the provision of high[-]quality social services’. This approach is to be welcomed. The Commission proposals do not, however, go far enough and are much too vague, especially where social sustainability is concerned.

Public authorities in the EU spend about 18% of GDP on supply, works, and service contracts; that being the case, reform of the public procurement rules could serve as a powerful lever to bring greater sustainability to society. Given that the money involved is public money, it should not be spent on short-term goals, but should, on the contrary, be viewed as a long-term investment in society; to that extent, the onus on the authorities is all the greater.

If it is to be pursued to useful effect, the above aim requires a broad approach. The following points are particularly important:

- The ‘lowest cost’ criterion must be done away with altogether. The ‘most economically advantageous tender’ is a sufficiently flexible concept to allow for a tender’s price. To make it clear what is meant by ‘most economically advantageous tender’, the name should be changed to ‘most economically advantageous and sustainable tender’ (MEAST).
- Applicable labour and social standards should be mentioned not just in the recitals, but also in the articles. All provisions applicable at the workplace, whether laid down by international conventions or European regulations or by national legislation, arbitration awards, or collective agreements, must be brought to bear – and that includes in cross-border situations.
- In addition, contracting authorities must be given the option of incorporating other types of social criteria in the technical specifications and/or award criteria; among the examples are employment opportunities for disadvantaged groups, access to on-site vocational training, and ethical trade. Even at the beginning of a procedure it has to be possible to assess whether a tenderer can fulfil those criteria. External social costs linked to the subject matter of the contract should be included in this context.
- When tenders are abnormally low, the criteria must be tightened up. If it were either 25% lower than the average for the tenders submitted or 10% lower than the next lowest tender, a tender could quite legitimately be considered so low that certain points would need explaining.

- The provisions on subcontracting in the Commission proposal do not go far enough. A tenderer must be required not only to refer in its tender to the matter of subcontracting, but also to name its subcontractors and enable them to be identified by listing their contact details and legal representatives. Furthermore, it has to be possible for the main contractor and all of the subcontractors involved to be made liable in the event of failure to comply with social or labour law, provisions on health and safety at work, or working conditions.
- The new chapter on social services is intended to provide a better guarantee of quality in personal services. Given quality criteria accordingly have to be binding. In addition, public contracts must not, under any circumstances, be awarded solely on the basis of the lowest price. To complete the chapter, provisions need to be laid down on exclusion criteria, subcontracting, and compliance with labour and social standards applicable at the workplace.
- To enable the directive to be implemented properly, Title IV (‘Governance’) needs to be expanded. When, for example, contractors have been found to be seriously and persistently at fault in the performance of their contracts, their names should be entered in a register, which must be accessible to contracting authorities; and the fact of appearing in the register must constitute a ground for exclusion. The application of the public procurement rules, and especially of labour and social standards at the workplace, should be monitored by the public oversight bodies.

## **AMENDMENTS**

The Committee on Employment and Social Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### **Amendment 1**

#### **Proposal for a directive Recital 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***(5a) Under Article 9 of the Treaty on the Functioning of the European Union, the Union must take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health in defining and implementing its policies and activities. This Directive contributes to attaining***

*these objectives by encouraging sustainable public procurement, the integration of social criteria in all stages of the procurement procedure and the respect of obligations relating to social and employment conditions, health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State.*

Or. en

*Justification*

*The reference to the horizontal social clause, which is a novelty of the Lisbon Treaty, is essential for sustainable procurement and for the inclusion of horizontal social criteria throughout the procurement procedure.*

**Amendment 2**

**Proposal for a directive  
Recital 5 b (new)**

*Text proposed by the Commission*

*Amendment*

***(5b) This Directive should not prevent Member States from complying with ILO Convention 94 on Labour Clauses in public contracts and encourages the inclusion of labour clauses in public procurement.***

Or. en

*Justification*

*ILO Convention 94 provides that public contracts shall include labour clauses ensuring equal treatment with local workers. Member States having ratified this Convention should not be hindered to respect its provisions. This clarification is particularly important in the context of the judgement of the Court in case C-346/06 (Rüffert).*

**Amendment 3**

**Proposal for a directive  
Recital 5 c (new)**

*Text proposed by the Commission*

*Amendment*

***(5c) This Directive ensures the application of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses in order to ensure the respect of the rules of equal competition and the protection of workers in the context of the transfer of an undertaking.***

Or. en

*Justification*

*If a public authority contracts out to the private sector a function which has previously been carried out in-house, a transfer in the meaning of the Transfer of undertakings Directive may take place. In these cases, the Transfer of undertakings Directive applies and provides for meaningful information and consultation procedures and prohibits any change of existing working conditions, including dismissal.*

**Amendment 4**

**Proposal for a directive  
Recital 5 d (new)**

*Text proposed by the Commission*

*Amendment*

***(5d) Contracting authorities have broad discretion to use both technical specifications and award criteria to achieve their objectives, including***

***sustainability objectives. Provided that the link to the subject matter rule is satisfied, this Directive is not intended to further constrain the types of concerns that a contracting authority can address through technical specifications or award criteria.***

Or. en

*Justification Public procurement rules must aim at more sustainability. Therefore, public authorities should have wide discretion for the integration of sustainability criteria in the technical specifications and award criteria, provided they have a link with the subject matter (as required by European case law on public procurement).*

## **Amendment 5**

### **Proposal for a directive Recital 5 e (new)**

*Text proposed by the Commission*

*Amendment*

***(5e) Technical specifications, award criteria, and conditions for contract performance are distinguished by the role they play in the procurement process, and not by their content. Through technical specifications, the contracting authority defines absolute requirements. In contrast, award criteria enable the contracting authority to compare the relative advantages of different combinations of criteria. Finally, contract performance clauses indicate how the contract must be performed.***

Or. en

#### *Justification*

*The role of technical specifications, award criteria and contract performance clauses needs specification. The revision of the Directive provides the opportunity to clarify that they should be distinguished by their form and not by their content. This will open up the possibility of including sustainability objectives already in the technical specifications. Additionally, a distinction of technical specifications, award criteria and contract performance clauses by their content does not take into due consideration the "link to the subject matter" rule that applies for all three and it doesn't fully respect the contracting authorities' discretion to*

define and decide what they want to procure.

## Amendment 6

### Proposal for a directive

#### Recital 11

##### *Text proposed by the Commission*

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should *therefore* be established *for public contracts for these services*, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for trans-border projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities *are able to* apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social

##### *Amendment*

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. *By their very nature they are in general difficult to reconcile with internal market rules applying to public procurement. Therefore, public authorities should prefer other ways of providing these services and must ensure high quality for the social services provided if they decide nevertheless to apply public procurement procedures. For a better protection of the quality of these services in public contracts*, a specific regime should be established, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for trans-border projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. *The essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general interest is also in line*

services in *a* way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

*with Protocol 26 on Services of general interest, Article 14 of the Treaty on the Functioning of the European Union and Article 36 of the Charter of Fundamental Rights.* The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee, *ensuring a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights. This means that principles such as quality, continuity, accessibility, availability and comprehensiveness of services, as well as democratic control and accountability are particularly important.* Member States and/or public authorities remain free to provide these services themselves, *including vertical "in-house" provision or horizontal inter-municipal (public-public) cooperation,* or to organise social services in *any other* way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination. *According to case law of the Court, in particular the judgement in case C-70/95 (Sodemare), contracting authorities may be allowed to reserve contracts to non-profit organisation, if such a restriction is provided for by national law and compatible with European law, if it is necessary and proportionate to attain certain societal goals of the national*

*welfare system.*

Or. en

*Justification*

*The respect of basic principles ensuring the high quality of social services should be binding. The wide discretion of Member States or public authorities in providing public services must be underlined. It must be clear that other ways of providing those services, which do not imply public procurement procedures (i.e. in-house provision or horizontal inter-municipal cooperation, or specific national systems like the 'sozialrechtliches Dreiecksverhältnis' in Germany), do also exist and they are conform with EU-law. The reference to the judgement of the Court in case C-70/95 (Sodemare) is essential for the reservation of contracts to non-profit organisations.*

**Amendment 7**

**Proposal for a directive**

**Recital 37**

*Text proposed by the Commission*

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. ***As a result, contracting authorities should be allowed to adopt as award criteria either 'the most economically advantageous tender' or 'the lowest cost', taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.***

*Amendment*

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process ***and other life cycle characteristics. Accordingly, contracting authorities should adopt award criteria in order to assess the contracting authority's sustainability concerns. Contracting authorities are also*** free to set adequate ***sustainability and*** quality standards by using technical specifications or contract performance conditions.

Or. en

## Amendment 8

### Proposal for a directive Recital 38

#### *Text proposed by the Commission*

(38) *Where contracting* authorities *choose to award a contract to the most economically advantageous tender, they* must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

#### *Amendment*

(38) **Contracting** authorities must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money, **taking into account sustainability concerns**. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Or. en

## Amendment 9

### Proposal for a directive Recital 40

#### *Text proposed by the Commission*

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities **can** determine the most economically

#### *Amendment*

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities **should** determine the most economically

advantageous tender **and the lowest cost** using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.

advantageous **and sustainable** tender using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.

Or. en

## Amendment 10

### Proposal for a directive Recital 41

#### *Text proposed by the Commission*

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. **In** order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award **crit***erion of the most economically advantageous tender*, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in

#### *Amendment*

Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to **life cycle characteristics, such as a specific production process, including for example social and environmental aspects**, a specific mode of provision of services, **functional or performance requirements aimed at minimizing or maximising environmental or social impacts**, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. **The link to the subject matter rule should be interpreted broadly.** Accordingly, in order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the **technical**

the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied *in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and* in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

*specifications and award criteria*, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may *for example* concern the protection of health of the staff involved in the production process, *gender balance (e.g. equal pay, work-life balance)*, *access to on-site vocational training, users' involvement and consultation, affordability, human rights, ethical trade* or the favouring of social integration of disadvantaged persons or members of vulnerable groups (*such as long-term unemployed persons, Roma, migrants or younger and older workers*) amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an *technical specifications or award criteria* the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality *and sustainability* of contract performance and, as a result, the economic value of the tender. *Contracting authorities may also integrate into technical specifications or award criteria social considerations relating to external social costs directly linked to the life-cycle, such as the impacts of production on the surrounding environment and adjacent communities. Contracting*

*authorities should lay down in the technical specifications obligations relating to social and employment conditions, health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State.*

Or. en

*Justification*

*If a public authority contracts out to the private sector a function which has previously been carried out in-house, a transfer in the meaning of the Transfer of undertakings Directive may take place. In these cases, the Transfer of undertakings Directive applies and provides for meaningful information and consultation procedures and prohibits any change of existing working conditions, including dismissal.*

**Amendment 11**

**Proposal for a directive**

**Recital 42**

*Text proposed by the Commission*

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority

*Amendment*

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority

should *be entitled to* reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price charged results from non-compliance with *mandatory* Union legislation in the fields of *social, labour or environmental law or international labour law provisions*.

should reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price charged results from non-compliance with Union legislation in the field of environmental law or with *obligations relating to social and employment conditions, health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State*.

Or. en

## Amendment 12

### Proposal for a directive Recital 43

#### *Text proposed by the Commission*

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements —

#### *Amendment*

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements —

applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation. *As regards obligations relating to social and employment conditions, health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed, contracting authorities should lay down provisions fixing an appropriate level of protection in the contract performance clauses.*

Or. en

### Amendment 13

#### Proposal for a directive

#### Recital 44

##### *Text proposed by the Commission*

(44) The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work apply during the performance of a public contract, ***provided that such rules, and their application, comply with Union law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament***

##### *Amendment*

(44) The laws, regulations and collective agreements, at both national and Union level, that are in force in ***the place where the work, service or supply is performed*** in the areas of employment conditions and safety at work ***should*** apply during the performance of a public contract, ***including in cross-border situations, where workers from one Member State provide services in another Member State.*** Where national law contains provisions to this effect, non-compliance with those

***and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions that must be observed by the host country in respect of such posted workers.*** Where national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct on the part of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

obligations may be considered to be grave misconduct on the part of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

Or. en

#### *Justification*

*All provisions for employment protection and working conditions have to be applicable, including all collective agreements, also in the case of the posting of workers. The judgement of the Court in case C-346/06 (Rüffert) has led to the interpretation of the core standards set by Directive 96/71/EC as maximum standards, applying only universally binding collective agreements and minimum wages; however, it needs to be ensured that there is equal treatment for all workers.*

#### **Amendment 14**

##### **Proposal for a directive Article 2 – point 22 a (new)**

*Text proposed by the Commission*

*Amendment*

***22a. ‘Life cycle characteristics’ means elements relating to any part of the life cycle of a product or works or the provision of a service, as defined in point (22) of this article. Life cycle characteristics can be invisible characteristics that are embedded in a product as a result of choices made in the production or other non-use phases of the life cycle.***

Or. en

*Justification*

*"Life cycle characteristics" are essential for the inclusion of sustainability concerns by public authorities. They should be defined in order to clarify how they can be included in technical specifications and award criteria.*

**Amendment 15**

**Proposal for a directive**

**Article 24 – paragraph 1 – subparagraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall provide that contracting authorities have to apply the competitive procedure with negotiation or competitive dialogue when the public contract might imply a transfer of undertaking.***

Or. en

*Justification*

*If a public authority contracts out to the private sector a function which has previously been carried out in-house, a transfer in the meaning of the Transfer of undertakings Directive may take place. In these cases, the Transfer of undertakings Directive applies and provides for meaningful information and consultation procedures and prohibits any change of existing working conditions, including dismissal.*

**Amendment 16**

**Proposal for a directive**

**Article 24 – paragraph 1– subparagraph 4 – point (e a) (new)**

*Text proposed by the Commission*

*Amendment*

***(ea) due to consultation requirements with employees' representatives for works or services where staff is affected.***

Or. en

## Amendment 17

### Proposal for a directive

#### Article 40 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply.

*Amendment*

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply ***in order to achieve the objectives of the contracting authority, including sustainability objectives.***

Or. en

## Amendment 18

### Proposal for a directive

#### Article 40 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other ***stage of its*** life cycle as referred to in point (22) of Article 2.

*Amendment*

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other life cycle ***characteristics*** as referred to in point ***22a (new)*** of Article 2.

***This may include:***

Or. en

#### *Justification*

*Social criteria have to be included in all stages of the public procurement process. It should be possible for public authorities to require the respect of certain social criteria already in the technical specifications. As the organisation, qualification and experience of staff influences significantly the quality and sustainability of a work or service, it should be able to require certain elements already in the technical specifications.*

## Amendment 19

### Proposal for a directive

#### Article 40 – paragraph 1 – subparagraph 2 –point (a) (new)

*Text proposed by the Commission*

*Amendment*

***(a) social criteria such as the respect of decent working conditions, health and safety regulation, collective bargaining, gender balance (e.g. equal pay, work-life balance), social inclusion, including employment opportunities for disabled, disadvantaged or vulnerable workers (such as long-term unemployed persons, Roma, migrants or younger and older workers), access to on-site vocational training, users involvement and consultation, affordability, human rights and ethical trade;***

Or. en

**Amendment 20**

**Proposal for a directive**

**Article 40 – paragraph 1 – subparagraph 2 - point b (new)**

*Text proposed by the Commission*

*Amendment*

***(b) social considerations relating to the external social costs directly linked to the life cycle as referred to in point (22) of Article 2, such as the impacts of production on the surrounding environment and adjacent communities;***

Or. en

**Amendment 21**

**Proposal for a directive**

**Article 40 – paragraph 1 – subparagraph 2 - point c (new)**

*Text proposed by the Commission*

*Amendment*

***(c) for service contracts and contracts involving the design of works, the organisation, qualification and***

*experience of staff assigned to performing the contract.*

Or. en

**Amendment 22**

**Proposal for a directive**

**Article 40 – paragraph 1 – subparagraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

*Obligations relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed, shall be clearly set out by contracting authorities in the technical specifications as part of the absolute requirements for the tendering of the contract.*

Or. en

*Justification*

*Obligations relating to social and employment protection and working conditions should be set out in the technical specifications as absolute requirements that have to be fulfilled in order to be considered a candidate.*

**Amendment 23**

**Proposal for a directive**

**Article 40 – paragraph 3 – point (a)**

*Text proposed by the Commission*

*Amendment*

(a) in terms of performance or functional requirements, including environmental

(a) in terms of performance or functional requirements, including environmental **and**

characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

*social* characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract, ***including, in accordance with paragraph 1, requirements relating to life cycle characteristics of the requested works, supplies and services, as referred to in point (22a new) of Article 2;***

Or. en

## Amendment 24

### Proposal for a directive Article 54 – paragraph 2

#### *Text proposed by the Commission*

2. Contracting authorities ***may*** decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of ***social and labour law or environmental law or of the international social and environmental law*** provisions listed in Annex XI.

#### *Amendment*

2. Contracting authorities ***shall*** decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of environmental law ***or with obligations relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law*** provisions listed in Annex XI, ***that apply in the place where the work, service or supply is performed, including in the subcontracting chain.***

Or. en

## Amendment 25

### Proposal for a directive Article 55 – paragraph 2

*Text proposed by the Commission*

2. Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes *or* social security contributions *in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.*

*Amendment*

2. Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes, social security contributions *or any other obligation relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State.*

Or. en

*Justification*

*The non-respect of social and labour protection provisions has to be a mandatory exclusion ground. This provision should also include national laws and regulations, arbitration award and collective agreements, applying in the place where the work, service or supply is performed*

**Amendment 26**

**Proposal for a directive  
Article 55 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Economic operators (including subcontractors) figuring on an official register of non-compliance as set out in Article 83a (new) shall be excluded from the participation in public contracts.***

Or. en

## Amendment 27

### Proposal for a directive

#### Article 55 – paragraph 3 – point (a)

*Text proposed by the Commission*

*Amendment*

***(a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.***

***deleted***

Or. en

#### *Justification*

*This exclusion ground should be moved to the mandatory exclusion grounds and be completed.*

## Amendment 28

### Proposal for a directive

#### Article 55 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. A contracting authority shall exclude from participation in a public contract any economic operator if one of the conditions set out in paragraph 1, 2, 2a (new) and points c) or d) of paragraph 3 is fulfilled in respect of a subcontractor proposed by the economic operator in accordance with Article 71.***

Or. en

### *Justification*

*The non-respect of social and labour protection provisions has to be a mandatory exclusion ground. This provision should also include national laws and regulations, arbitration award and collective agreements applying in the place where the work, service or supply is performed.*

### **Amendment 29**

#### **Proposal for a directive**

#### **Article 55 – paragraph 4 – subparagraph 1**

##### *Text proposed by the Commission*

Any candidate *or* tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

##### *Amendment*

Any candidate, tenderer *or subcontractor* that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

Or. en

### **Amendment 30**

#### **Proposal for a directive**

#### **Article 55 – paragraph 4 – subparagraph 2**

##### *Text proposed by the Commission*

For this purpose, the candidate *or* tenderer shall prove that it has compensated any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Contracting authorities shall evaluate the measures taken by the candidates *and* tenderers taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the

##### *Amendment*

For this purpose, the candidate, tenderer *or subcontractor* shall prove that it has compensated any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Contracting authorities shall evaluate the measures taken by the candidates, tenderers *or subcontractors* taking into account the gravity and particular circumstances of the

contracting authority considers the measures to be insufficient, it shall state the reasons for its decision.

criminal offence or misconduct. Where the contracting authority considers the measures to be insufficient, it shall state the reasons for its decision.

Or. en

### Amendment 31

#### Proposal for a directive

#### Article 56 – paragraph 1 – subparagraph 1 – point (c a) (new)

*Text proposed by the Commission*

*Amendment*

***(ca) experience with sustainable and social performance.***

Or. en

### Amendment 32

#### Proposal for a directive

#### Article 56 – paragraph 1 – subparagraph 3

*Text proposed by the Commission*

*Amendment*

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be ***related and strictly proportionate*** to the subject matter of the contract, taking into account the need to ensure ***genuine*** competition.

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities ***and the abilities and knowledge for social and sustainable procurement*** to perform the contract to be awarded. All requirements shall be ***linked*** to the subject matter of the contract, taking into account the need to ensure ***fair*** competition.

Or. en

### Amendment 33

#### Proposal for a directive

#### Article 56 – paragraph 4 – subparagraph 1

*Text proposed by the Commission*

With regard to technical and professional ability, contracting authorities may require that economic operators possess the necessary human and technical resources and experience to **perform** the contract to an appropriate quality standard.

Contracting authorities may conclude that economic operators will not **perform** the contract to an appropriate quality standard where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

*Amendment*

With regard to technical and professional ability, contracting authorities may require that economic operators possess the necessary human and technical resources and experience to **ensure the performance of** the contract to an appropriate quality standard **and, where so requested by the contracting authority, in accordance with any contract performance clause specified in accordance with Articles 70 and 71.** Contracting authorities may conclude that economic operators will not **ensure the performance of** the contract to an appropriate quality standard where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

Or. en

*Justification*

*The formulation needs to be broadened in order to take into account the possibility to supervise subcontractors. The Article should also clarify that contracting authorities may use the selection stage to assess the ability of the contractor to deliver the contract performance requirements.*

**Amendment 34**

**Proposal for a directive**  
**Article 56 – paragraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

**4a. With regard to the experience with sustainable and social performance criteria, investment in skills and training and experience with supply-chain management may be taken into account.**

Or. en

## Amendment 35

### Proposal for a directive Article 60 – paragraph 3

*Text proposed by the Commission*

3. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XIV, part 2, according to the nature, quantity or importance, and use of the works, supplies or services.

*Amendment*

3. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XIV, part 2, according to the nature, quantity, **quality, sustainability** or importance, and use of the works, supplies or services.

Or. en

## Amendment 36

### Proposal for a directive Article 66 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criteria** on which contracting authorities shall base the award of public contracts shall be **one of the following**:

- (a) the most economically advantageous tender;**
- (b) the lowest cost.**

*Amendment*

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criterion** on which contracting authorities shall base the award of public contracts shall be **the most economically advantageous and sustainable tender**.

Or. en

### *Justification*

*In order to achieve the goals of the EU 2020 strategy and the "societal goals" set out in the explanatory statement by the Commission, more sustainable public procurement procedures are needed. Therefore, the criterion of the lowest cost has to be deleted (this is already current practice in some Member States, e.g. in Germany). The most economically advantageous tender must become the most economically advantageous and sustainable tender to make clear what the term stands for.*

## Amendment 37

### Proposal for a directive Article 66 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

Costs may be assessed, ***on the choice of the contracting authority, on the basis of the price only or*** using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

*Amendment*

Costs ***shall*** be assessed using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

Or. en

## Amendment 38

### Proposal for a directive Article 66 – paragraph 2 – introductory part

*Text proposed by the Commission*

The most economically advantageous tender ***referred to in point (a) of paragraph 1 from the point of view of the contracting authority*** shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs ***referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question,*** such as:

*Amendment*

The most economically advantageous ***and sustainable*** tender shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs ***(including life-cycle costs as referred to in Article 67), other criteria linked to the subject-matter of the public contract in question,*** such as:

Or. en

## Amendment 39

### Proposal for a directive Article 66 – paragraph 2 – point d

*Text proposed by the Commission*

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life

*Amendment*

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life

cycle as referred to in *point (22)* of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

cycle *or life cycle characteristics* as referred to in *points (22) and (22a new)* of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

Or. en

*Justification*

*The possibility to include social criteria should be explicitly stated.*

**Amendment 40**

**Proposal for a directive  
Article 66 – paragraph 2 point d a (new)**

*Text proposed by the Commission*

*Amendment*

*(da) social criteria such as the respect of decent working conditions, health and safety regulation, collective bargaining, gender balance (e.g. equal pay, work-life balance), social inclusion, including employment opportunities for disabled, disadvantaged or vulnerable workers (such as long-term unemployed persons, Roma, migrants or younger and older workers), access to on-site vocational training, users involvement and consultation, affordability, human rights and ethical trade;*

Or. en

**Amendment 41**

**Proposal for a directive  
Article 66 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

*3. Member States may provide that the award of certain types of contracts shall*

*deleted*

*be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.*

Or. en

## **Amendment 42**

### **Proposal for a directive Article 66 – paragraph 4**

#### *Text proposed by the Commission*

4. Award criteria shall ***not confer an unrestricted freedom of choice on the contracting authority. They*** shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

#### *Amendment*

4. Award criteria shall ***be linked to the subject matter (this does not exclude invisible characteristics of products or services such as life cycle characteristics as referred to in point (22a new), they*** shall ensure the possibility of effective ***and fair*** competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

Or. en

#### *Justification*

*In order to allow a clear lecture of what the conditions for including sustainability criteria such as social aspects in the award criteria are, the link to the subject matter criterion should be added here. This does not exclude so-called "invisible" characteristics.*

## **Amendment 43**

### **Proposal for a directive Article 66 – paragraph 5 – subparagraph 1**

#### *Text proposed by the Commission*

***In the case referred to in point (a) of***

#### *Amendment*

***The*** contracting authority shall specify, in

**paragraph 1** the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous **and sustainable** tender.

Or. en

#### **Amendment 44**

##### **Proposal for a directive Article 67 – point (b a)(new)**

*Text proposed by the Commission*

*Amendment*

***(ba) external social costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the impacts of production on the surrounding environment and adjacent communities.***

Or. en

#### *Justification*

*There is no reason why external environmental costs should be mentioned in the life-cycle costing but not external social costs. External social costs may for example include the impacts of production on the surrounding environment and adjacent communities.*

#### **Amendment 45**

##### **Proposal for a directive Article 67 – paragraph 2 – subparagraph 1 – point (b)**

*Text proposed by the Commission*

*Amendment*

***(b) it has been established for repeated or continuous application;***

***deleted***

Or. en

*Justification*

*This criterion is far too restrictive. It should be sufficient for the methodology for calculating life-cycle costs to be based on scientific or other objective and non-discriminatory criteria and to be accessible to all interested parties.*

**Amendment 46**

**Proposal for a directive**

**Article 69 – paragraph 1 – introductory part**

*Text proposed by the Commission*

Contracting authorities shall require economic operators to explain the price or costs charged, where **all of** the following conditions **are** fulfilled:

*Amendment*

Contracting authorities shall require economic operators to explain the price or costs charged, where **one of** the following conditions **is** fulfilled:

Or. en

**Amendment 47**

**Proposal for a directive**

**Article 69 – paragraph 1 – point (a)**

*Text proposed by the Commission*

(a) the price or cost charged is more than **50 %** lower than the average price or costs of the remaining tenders

*Amendment*

(a) the price or cost charged is more than **25 %** lower than the average price or costs of the remaining tenders, **or**

Or. en

*Justification*

*The conditions that have to be fulfilled for a tender to be abnormally low should not be cumulative. A price or cost difference of 25% regarding the average is already a lot.*

**Amendment 48**

**Proposal for a directive**

**Article 69 – paragraph 1 – point (b)**

*Text proposed by the Commission*

(b) the price or cost charged is more than **20 %** lower than the price or costs of the

*Amendment*

(b) the price or cost charged is more than **10 %** lower than the price or costs of the

second lowest tender;

second lowest tender;

Or. en

#### **Amendment 49**

##### **Proposal for a directive**

##### **Article 69 – paragraph 1 – point (c)**

*Text proposed by the Commission*

*Amendment*

***(c) at least five tenders have been submitted.***

***deleted***

Or. en

##### *Justification*

*This condition is far too restrictive. A tender can be abnormally low without this condition being fulfilled.*

#### **Amendment 50**

##### **Proposal for a directive**

##### **Article 69 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.

2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations, ***in particular in cases where the price or costs charged are lower than the price or costs paid to the current operator or where the price or costs charged are lower than the prices resulting from other current and comparable procurement procedures.***

Or. en

#### **Amendment 51**

##### **Proposal for a directive**

##### **Article 69 – paragraph 3 – point (d)**

*Text proposed by the Commission*

(d) compliance, ***at least in an equivalent manner***, with obligations ***established*** by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

*Amendment*

(d) compliance with obligations established by Union legislation in the field of environmental law or ***with obligations relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law*** provisions listed in Annex XI, ***that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State***, or, where not applicable, with other provisions ensuring an equivalent level of protection;

Or. en

## **Amendment 52**

### **Proposal for a directive**

#### **Article 69 – paragraph 3 – point (e a) (new)**

*Text proposed by the Commission*

*Amendment*

***(ea) compliance with requirements related to Article 71.***

Or. en

#### *Justification*

*It makes sense to refer to Article 71 on subcontracting in the explanations that have to be furnished for abnormally low tenders.*

## Amendment 53

### Proposal for a directive

#### Article 69 – paragraph 4 –subparagraph 1

##### *Text proposed by the Commission*

The contracting authority shall verify the information provided by consulting the tenderer. It **may only** reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

##### *Amendment*

4. The contracting authority shall verify the information provided by consulting the tenderer. It **shall** reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Or. en

## Amendment 54

### Proposal for a directive

#### Article 69 – paragraph 4 –subparagraph 2

##### *Text proposed by the Commission*

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with **obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.**

##### *Amendment*

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with **provisions set out in paragraph 3(d).**

Or. en

## Amendment 55

### Proposal for a directive

#### Article 70

##### *Text proposed by the Commission*

Conditions for performance of contracts  
Contracting authorities may lay down special conditions relating to the performance of a contract, provided that

##### *Amendment*

Conditions for performance of contracts  
Contracting authorities may lay down special conditions relating to the performance of a contract, provided that

they are indicated in the call for competition or in the specifications. Those conditions **may, in particular, concern social and environmental considerations**. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

they are indicated in the call for competition or in the specifications. Those conditions **shall include obligations relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State**. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

Or. en

#### *Justification*

*Obligations regarding social and employment protection and working conditions have to be clearly set out in the contract performance clauses in order to ensure that they are respected.*

#### **Amendment 56**

#### **Proposal for a directive Article 71 – paragraph 1**

##### *Text proposed by the Commission*

1. In the procurement documents, the contracting authority **may** ask or **may** be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

##### *Amendment*

In the procurement documents, the contracting authority **shall** ask or **shall** be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors **and to give information on their subcontractors including their names, contact details and legal representatives. Any change in the**

***subcontracting chain and any new subcontractor shall be indicated without delay to the contracting authority, including their names, contact details and legal representatives.***

Or. en

*Justification*

*The Commission proposal goes into the right direction but is insufficient as regards subcontracting. Subcontractors have to be identifiable by their name, contact details and legal representatives. Any changes occurring have to be indicated to the contracting authority.*

**Amendment 57**

**Proposal for a directive  
Article 71 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. The reasons for the use of subcontractors shall be set out in the procurement documents and should be due to technical considerations and not aim at lowering labour costs.***

Or. en

**Amendment 58**

**Proposal for a directive  
Article 71 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Member States ***may*** provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The

2. Member States ***shall*** provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The

arrangements concerning that mode of payment shall be set out in the procurement documents.

arrangements concerning that mode of payment shall be set out in the procurement documents.

Or. en

## Amendment 59

### Proposal for a directive Article 71 – paragraph 3

*Text proposed by the Commission*

***3. Paragraphs 1 and 2 shall be without prejudice to the question of the principal economic operator's liability.***

*Amendment*

***3. The main contractor and any intermediate subcontractor can, in addition to or in place of a subcontractor, be directly held liable like a guarantor by the employee and/or common funds or institutions of social partners for any liability which arises from the failure by a subcontractor to comply with provisions relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State. This shall apply without any further conditions, in particular without the employer being directly at fault.***

Or. en

#### *Justification*

*The joint and several liability of the main contractor and his subcontractors is the only way to effectively ensure the protection of workers rights. However, the concept itself has also been put forward by the Commission in the Enforcement Directive on the Posting of Workers for the first time, even if we have broadened its application in this context.*

## Amendment 60

### Proposal for a directive Article 71 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. The number of subcontracting companies involved in the execution of a public contract shall be restricted to a maximum of 3 subsequent subcontractors.***

Or. en

*Justification*

*This provision will ensure that the number of subsequent subcontractors stays limited, whereas horizontal subcontracting, as might be required by big construction works, remains possible.*

## Amendment 61

### Proposal for a directive Article 73 (a) (new)

*Text proposed by the Commission*

*Amendment*

***Member States have wide discretion to organize the choice of the service providers in the way they consider most appropriate and are free to provide social services and other specific services themselves or to organize their provision in any other way that does not entail the conclusion of public contracts, provided such a system ensures compliance with the basic principles of transparency and non-discrimination.***

Or. en

*Justification*

*The wide discretion of Member States concerning the choice of how to provide services of general interest should also be underlined in the Articles and not only in the recitals.*

## Amendment 62

### Proposal for a directive Article 76 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that contracting authorities **may** take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States **may also** provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

*Amendment*

2. Member States shall ensure that contracting authorities take into account the need to ensure **high** quality, continuity, accessibility, **affordability**, availability and comprehensiveness of the services, the specific needs of different categories of users, **including disadvantaged and vulnerable groups**, the involvement and empowerment of users and innovation. Member States **shall** provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service, **but take into account quality and sustainability criteria for social services as set out above**.

Or. en

*Justification*

*Criteria ensuring high quality of social services have to be binding.*

## Amendment 63

### Proposal for a directive Article 76 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

**2a. Member States and/or contracting authorities shall ensure that economic operators respect obligations relating to social and employment conditions, such as health and safety at workplace, social security and working conditions as set out by EU and national laws, regulations or administrative provisions, arbitration award, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply**

*in the place where the work, service or supply is performed; these obligations shall also apply in cross-border situations, where workers from one Member State provide services in another Member State.*

Or. en

*Justification*

*Social and labour protection provisions must also be respected for the provision of social services.*

**Amendment 64**

**Proposal for a directive  
Article 76 – paragraph 2 b (new)**

*Text proposed by the Commission*

*Amendment*

***2b. Member States shall ensure that the provisions on subcontracting, as set out in Article 71, are respected.***

Or. en

**Amendment 65**

**Proposal for a directive  
Article 76 – paragraph 2 c (new)**

*Text proposed by the Commission*

*Amendment*

***2c. Member States shall ensure the application of the exclusion grounds as set out in Article 55.***

Or. en

## **Amendment 66**

### **Proposal for a directive Article 76 – paragraph 2 d (new)**

*Text proposed by the Commission*

*Amendment*

***2d. When choosing the service provider, Member States may consider to use reserved contracts as set out in Article 17.***

Or. en

## **Amendment 67**

### **Proposal for a directive Article 76 – paragraph 2 e (new)**

*Text proposed by the Commission*

*Amendment*

***2e. Contracting authorities may reserve specific contracts for non-profit organisations which specialise in providing social services, if the basic principles of transparency and equal treatment are respected.***

Or. en

### *Justification*

*According to the case law of the Court, in particular the judgement in case C-70/95 (Sodemare) contracting authorities are allowed to reserve contracts to non-profit organisation, if such a restriction is provided for by national law and compatible with European law, if it is necessary and proportionate to attain certain societal goals of the national welfare system.*

## **Amendment 68**

### **Proposal for a directive Article 83 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Where an economic operator or a subcontractor appointed for a contract has been found to have shown significant or persistent deficiencies in the performance of any substantive requirement under the contract, the contracting authority shall communicate the facts and the necessary details to the supervisory and to the administrative authorities mentioned in Articles 84 and 88.***

Or. en

#### **Amendment 69**

**Proposal for a directive  
Article 83 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***1b. Member States shall ensure that contracting authorities can easily obtain information and assistance with regard to the application of this Article through the supervisory and administrative authorities provided for in Article 84 and 88.***

Or. en

#### **Amendment 70**

**Proposal for a directive  
Article 83 a – paragraph 1 (new)**

*Text proposed by the Commission*

*Amendment*

***Register of non-compliance  
If an economic operator violates the conditions set out in the contract, in particular regarding social and***

*employment protection, working conditions and subcontracting, he shall be inscribed in a register of non-compliance. Figuring in a register of non-compliance shall be an exclusion ground.*

Or. en

*Justification*

*Economic operators violating the conditions set out in the procurement contract should be registered in order to allow contracting authorities to track violations.*

**Amendment 71**

**Proposal for a directive  
Article 83 a – paragraph 2 (new)**

*Text proposed by the Commission*

*Amendment*

***2. Registers of non-compliance shall be managed by the supervisory and administrative authorities mentioned in Article 84 and 88. Contracting authorities shall be able to consult these lists before awarding a public contract.***

Or. en

**Amendment 72**

**Proposal for a directive  
Article 84 – paragraph 3 – point (a)**

*Text proposed by the Commission*

*Amendment*

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(a) monitoring the correct application of public procurement rules and ***of the rules on social and employment protection and working conditions by the economic operator awarded the contract and by his subcontractors including*** the related practice by contracting authorities and in particular by central purchasing bodies;

### Amendment 73

#### Proposal for a directive

#### Article 84 – paragraph 3 – point (e)

*Text proposed by the Commission*

(e) drawing the attention of the **national** competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

*Amendment*

(e) drawing the attention of the competent institutions, including auditing authorities, to specific violations detected **or as communicated under Article 83 paragraph 1 a (new)** and to systemic problems;

Or. en

### Amendment 74

#### Proposal for a directive

#### Article 84 – paragraph 3 – point (g a) (new)

*Text proposed by the Commission*

*Amendment*

**(ga) managing of registers of non-compliance as laid down in Article 83 a (new).**

Or. en

### Amendment 75

#### Proposal for a directive

#### Article 85 – subparagraph 1 – point (e)

*Text proposed by the Commission*

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

*Amendment*

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties **and information on their subcontractors including their names, contact details and legal representatives;**

## **Amendment 76**

### **Proposal for a directive Article 88 – paragraph 1**

#### *Text proposed by the Commission*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63 *and* 69. They shall ensure the confidentiality of the information which they exchange.

#### *Amendment*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63, 69 *and 83 a (new)*. They shall ensure the confidentiality of the information which they exchange.

Or. en

## **Amendment 77**

### **Proposal for a directive Annex XI – indent 3 a (new)**

#### *Text proposed by the Commission*

#### *Amendment*

*- Convention 94 on Labour Clauses in Public Contracts.*

Or. en

#### *Justification*

*ILO Convention 94 should also figure on the reference list of international social and environmental conventions. This takes due account of those Member States which have ratified the Convention.*

## **Amendment 78**

### **Proposal for a directive Annex XIII – point (b)**

*Text proposed by the Commission*

*Amendment*

(b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in Article 55(1);

(b) Certification that the economic operator has not been the subject of a conviction by final judgment ***or of a decision having the force of res judicata*** for one of the reasons listed in Articles 55(1) ***or 55(2)***;

Or. en

#### **Amendment 79**

##### **Proposal for a directive Annex XIII – point (c a) (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) Certification that the economic operator does not figure in a register of non-compliance as set out in Article 83a (new);***

Or. en

#### **Amendment 80**

##### **Proposal for a directive Annex XIII – point (c b) (new)**

*Text proposed by the Commission*

*Amendment*

***(cb) Certification that the issuing authority is not aware that the economic operator is in one of the situations listed in Article 55(3) (c) or (d) or Article 55 (3a) (new).***

Or. en

#### *Justification*

*The list in Annex XIII on the contents of the European Public Procurement Passport has to be completed and has to contain the payment of taxes and social security contributions, the respect of social and employment protection and working conditions, the certification that the*

*economic operator does not figure on an official list of non-compliance, that sub-contractors have to respect these same provisions and that grave professional misconduct and significant and persistent deficiencies do also have to be taken into account.*

#### **Amendment 81**

##### **Proposal for a directive Annex XVI – point 6**

*Text proposed by the Commission*

*Amendment*

***Services furnished by trade unions***

***deleted***

Or. en

##### *Justification*

*As trade unions are autonomous private entities and public procurement does not apply, their inclusion in the social services regime is misleading.*

#### **Amendment 82**

##### **Proposal for a directive Annex XVI – point 7 a (new)**

*Text proposed by the Commission*

*Amendment*

***Emergency medical services***

Or. en

##### *Justification*

*Emergency medical services should also be considered as social services of general interest falling under the lighter regime.*